

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-023


LCDR (O-4)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on March 24, 2022, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated December 15, 2023, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, an active-duty Lieutenant Commander (LCDR/O-4), asked the Board to remove from his record his Officer Evaluation Report (OER) for the period June 2, 2018, through April 30, 2019, when he was serving as the Chief of the vessel Inspections Division for a Sector. In the alternative, if the Board finds that there are no grounds to remove the entire OER from his record, the applicant asked that his marks of 5 (on a scale from 1 (worst) to 7 (best)) for the performance dimensions "Using Resources," "Professional Competence," "Speaking and Listening," "Workplace Climate," and "Professional Presence," be increased to marks of 6. In addition, the applicant asked that his mark in the fourth spot (the middle of seven) on the Comparison Scale be increased to a mark in the fifth spot. Finally, the applicant requested that the following comments be added to his OER:

- **Using Resources:** Flawlessly oversaw the Inspections Division and empowered Port State Control (PSC) and Domestic branch chiefs to manage daily operations accordingly without the availability of the inspector workforce comprised of 06 civilians during the longest Government shutdown in U.S. history; streamlined the process by instituting a collective inspection division that capitalizes on the experience, training, and competencies of all members, resulting in the completion of 30+ PSC examinations and 40+ Domestic inspections.
- **Professional Competence:** Monitored 3 vessel detentions from inception until HQ validation; as sole qualified Hull Inspector not only second MI to have attained Advanced Journeyman Marine Inspector (AJMI) designation, expertly led 06 Domestic inspections and trained 05 Mis within months of reporting to the unit, with all Mis completing 30% of PQS and on track to attain major qualification.

- **Speaking and Listening:** As CID, maintained tactful posture during meetings with mariners, marine employers, and port partners and provided the necessary guidance and direction whenever policies, laws or regulations were not transparent or in layman's terms including foreign detention, domestic vessel appeals, and COTP orders; consistently provided direct supervisor with innovative ideas to improve mission execution.
- **Workplace Climate:** Collaborated with D[redacted] HR USO; and Fleet Reserve Association to support 06 JOs, 5 CWOs, 07 POs, 1 CPO, and 06 Civilians severely impacted by the 35-day government shutdown; provided just in time information on available resources to assist with pay, medical, and dental care concerns; swift actions prevented CG members from facing unnecessary stress and hardship during a time of desperate need.
- **Professional Presence:** Spearheaded creation/coordination of CG/Industry event that addressed potential gaps and communication between industry reps/owners; arranged with POCs from different Prevention divisions to assist with specific marine casualties, worker's compensation, general inspections and offshore operations issues to facilitate and maintain an open dialogue within the maritime community; promoted an environment of fairness, candor and respect between local, state, and federal entities throughout the event that encouraged GC/Industry relations and allowed from streamlined cooperation.

A summary of the applicant's allegations appears below the Summary of the Record.

SUMMARY OF THE RECORD

On January 28, 1997, the applicant enlisted in the United States Coast Guard where he trained as a Health Services Technician and advanced to the rank of Petty Officer, First Class (E-6), before attending Officer Candidate School and being commissioned an Ensign on May 10, 2006. He was promoted to Lieutenant Commander on July 1, 2017.

On July 1, 2017, the applicant received Permanent Change of Station (PCS) orders and became the Chief of a Sector Inspections Division.

On April 5, 2019, the applicant's supervisor, CDR B, emailed the applicant and requested that the applicant provide additional input for his annual OER for the period June 2, 2018, through April 30, 2019. CDR B stated that the applicant had failed to mention "a single thing" about the government shutdown in his input and that the applicant should have a few things to say about this. In addition, CDR B informed the applicant that a lot of the applicant's bullet points were vague. CDR B further stated that he needed specific incidents from the applicant that would support the performance dimensions.

On April 5, 2019, the applicant responded to CDR B's email request with the following:

Incredible resilience during the 2018-2019 lapse in appropriations. As CPREV, aided 7 JOs, 12 Pos, & 7 Civilian in identifying and solving pay issues. Met personal and mission demands day and night and on weekends without failure, keeping a strong and resilient workforce.

On April 22, 2019, CDR B again reached out to the applicant and stated that the additional information was "good" but asked for a few more specific bullet points for the "Performance" and "Professional Qualities" sections of the OER.

On June 25, 2019, the applicant signed his annual OER for the June 2, 2018, through April 30, 2019, rating period. The applicant received five marks of 5, ten 6s, and three 7s in the various performance dimensions. The applicant also received the following comments to support his Supervisor's marks in the performance dimensions:

Performance of Duties: Coordinated w/Nat'I Center of Expertise on specialized 3-day Liquefied Natural Gas (LNG) training for 100+ CG & port wide maritime 1st responders; organized live demo of LNG for attendees to witness reaction outside containment, facilitated tours of US's largest LNG facility under const & arranged for experts to train CG inspectors on specific characteristics of LNG as a cargo & inspection of critical cargo systems; clarified myths & brought more awareness on chemical properties for stakeholders from state/local agencies & industry partners & prepared unit for 300 LNG vessel arrivals/yr. As acting dept head, oversaw movement of inland ATON cutter during thick fog; analyzed unit risk assessment to ensure safe transit & required 30-min communication schedule until cutter safely moored at destination; swift actions allowed command cadre to approve transit plan keeping crew of 14 safe while ensuring mission success. Organized mandatory third party oversight stand down for all marine inspectors and command cadre; familiarized unit with existing policy, facilitated unit discussions & educated personnel on third party oversight by assigning topics for staff to present; aligned internal procedures with rest of the field & improved overall safety framework.

Leadership Skills: Enhanced dept training officer roles to closely monitor professional development of Apprentice Marine Inspectors (AMI) putting emphasis on IDing quals needed by unit while balancing growth opportunities; updated training board requirements by cutting red tape resulting in 8 AMIs receiving 12 quals improving mission readiness. Demo'ed genuine care for others; consoled mbrs w/personal hardships; 2 w/loss of parent & 1 w/newborn hospitalized for serious long-term illness; maintained close contact, shifted responsibilities w/individ to ensure mbr given the time needed while accomplishing tasks resulting in zero delays in productivity. Spearheaded the hosting of an industry day conf to discuss new reg changes & introduce newly reported inspectors to industry, implemented novel format to increase effectiveness, encouraged 1st time partnership w/other fed/state/lei agencies to incorporate whole of gov approach w/in maritime safety, promoted open discussions between industry & CG enhancing strong relationships.

Personal and Professional Qualities: Initiated safety shipyard exams utilizing previous experience to bridge relationship w/OSHA; organized mandatory training w/all marine inspectors IDing common hazards; resulted in 1st ever exam of local shipyard discovering 6 safety deficiencies; worked w/shipyard CO to address concerns decreasing risk of inspectors getting injured. Led exam aboard oceangoing tug/barge; found manning discrepancies between 2 documents, amended manning certificate vice requiring new stability test; keen eye prevented vessel carrying more mariners than permitted. Made profound impact on unit's safety program within 1 month of reporting; more than doubled safety committee participation, enhanced local policy to ensure newly reported personnel were issued the necessary PPE, which heightened overall safety awareness preventing mishaps & exposure to chemical, biological or radiological hazards.

The applicant's Reporting Officer (RO), who was the Deputy Sector Commander, assigned the applicant a Comparison Scale mark in the fourth spot of 7, which is the middle mark for the "One of the many high performing officers who form the majority of this grade,"¹ and a mark of "Promote" on the Promotion Scale.² The RO also entered the following comments in the OER:

¹ On an OER form CG-5310A, an officer is marked in one of seven possible spots on the Comparison Scale. To complete the Comparison Scale, the Reporting Officer is asked to compare his or her subordinate to all of the other officers of the same grade whom the Reporting Officer has known throughout his or her career. The first spot on the scale denotes "Unsatisfactory" performance; the second is "Marginally performing officer"; the third, fourth, and fifth spots denote "One of the many high performing officers who form the majority of this grade"; the sixth denotes "One of few distinguished officers"; and the seventh is "Best officer of this grade."

² On an OER form CG-5310A, there are eight possible marks on the Promotion Scale. The first two are for officers who have already been selected for promotion and are awaiting promotion and for officers who have been promoted within the past 12 months and so a recommendation regarding further promotion would be precipitate. For officers

Reporting Officer Comments: Recommended for promotion to O-5. Executed duties & responsibilities achieving operational success across the nation's fourth largest port. A focused and driven officer that empowers the team while showcasing a broad range of technical expertise and decision-making ability. Collaborative leadership style respected by senior command, peers and subordinates; expertly balanced primary duties with assigned demanding unit safety manager collateral duty; extremely versed in workplace hazard assessments, mishap investigations & contingency preparedness. Consistently exercises sound judgment, rapidly assesses situations & makes exceptional personnel management decisions benefiting all stakeholders involved. Background in safety coupled with rich prevention portfolio earns my recommendation for MSU XO, Sec CPREV, Int'l Port Security liaison and industry training of choice.

On or about July 23, 2019,³ the applicant applied to the Personnel Records Review Board (PRRB) to contest this OER. The applicant requested that the PRRB change his Comparison Scale rating from the fourth spot to the fifth.

On August 30, 2019, the applicant submitted a Reported-on Officer (ROO) Reply to be attached to the OER in his permanent record wherein he contested the marks of 5 he had received. The applicant stated that the support form that he provided to his supervisor CDR B with his input for the OER supported higher marks of 6 in the categories he had received 5s in. The applicant provided a two-page overview of his accomplishments for the rating period.

On August 30, 2019, the applicant's supervisor, CDR B, submitted a First Endorsement to the applicant's ROO Reply and stated that he had reviewed the information therein and had utilized it, in addition to other information, to support his final evaluation of the applicant. CDR B stated that he stood by the marks he had included in the disputed OER.

On November 13, 2020, the PRRB issued its decision and recommended granting no relief, concluding that the applicant had failed to provide clear and convincing evidence to overcome the presumption of regularity with respect to his disputed OER, and the OER contained no substantive errors. The PRRB further concluded that the applicant's rating chain had carried out their responsibilities and accurately documented the applicant's performance based upon their observations of the applicant's performance during the applicable rating period. Finally, the PRRB stated that it had considered the applicant's submission along with the rating chain's responses (below) and found that no action was warranted because the applicant had failed to substantiate any error or injustice and did not produce clear and convincing evidence to overcome the presumption of regularity with respect to the contested OER. The following sworn declarations from the applicant's chain of command had been sought and submitted to the PRRB by the Coast Guard Personnel Service Center in response to the applicant's PRRB application:

- I, Commander [B], United States Coast Guard, declare as follows, pursuant to Title 28 United States Code §1746:

who do not fit those categories, the scale rises up from "Do not promote" to "Promotion Potential" to "Promote" to "Promote w/top 20% of peers" to "In-zone reorder" to "Below zone select."

³ This date was gained from Paragraph 1 of the applicant's personal statement to the Board, but the PRRB's Matters of Record provided an application date of June 7, 2019. However, the applicant's contested OER was not validated until August 13, 2019. Given these dates, it appears the applicant applied for relief to the PRRB before his OER was validated by PSC.

1. I'm currently assigned at Coast Guard Headquarters, COMDT (CG·SP). At the time of observation, I was the Prevention Department Head at Sector/Air Station [redacted] and was the direct supervisor for LCDR [Applicant].

2. I read the provided material for PRRB #014-20 and offer my perspective for the board to consider when evaluating this application. Professionally, LCDR [Applicant] is a good, hardworking man with integrity and genuinely cared for his people. Furthermore, he was a very knowledgeable safety manager given his background in HSWL and his safety certifications. I understand why he was able to gather positive feedback from his peers to support his case. The mark he is contesting was my recommendation to the Deputy Sector Commander, who was the RO, based on my justification provided below.

a. **Leadership:** From my perspective and interactions with the crew, I felt LCDR [Applicant's] leadership was not valued by his subordinates. He was a friend to them, they did what he needed, and he supported their personal needs, but he was viewed as a middle person and lacked decisiveness, consistency and fortitude to own and sell difficult decisions, especially to the veteran marine inspectors. I value everyone's opinion, but sometimes leaders need to get the team onboard with a way forward. Before carrying out an idea or decision, I sought his opinion and listen[ed] to his perspective. We discussed it to make sure we understood why and were in agreement. On several occasions, he came back later with a changed mind and little justification to reverse the decision after speaking with his crew. In my opinion, the experienced marine inspectors were influential, and he sometimes caved to their suggestions, right or wrong. On numerous occasions, I spoke to him about this and felt he understood. I continued to work with him during my two years as his direct supervisor.

b. **Workplace Environment:** Based on my observations, LCDR [Applicant] was easily excitable and openly complained to his subordinates about his workload. As the unit safety manager, he worked on projects directly for the Deputy, while having to balance his primary duties for me. This was something I saw other O4s/O3s at the unit do with success. He often expressed his frustration to the enlisted, civilians, JOs and CWOs and gave the impression he had little time for his primary duties, resulting in one of his staff speaking with me. After listening to the member, I immediately expressed my concerns with LCDR [Applicant] and suggested that he stop his open complaining to his crew. In my opinion, he knew safety well and worked hard to address gaps at the unit. Therefore, he dedicated a lot of his time doing more than was required on safety projects without delegating, resulting in his primary duties suffering. The Deputy and I together encouraged him to delegate and outlined a path for him to better manage his time, but he never followed through.

c. **Project Management:** LCDR [Applicant] received several accolades, however there was a lot of micromanagement needed to get him there. During those sessions, I provided him plenty of feedback, but he either disagreed or didn't fully understand. When assigned a project, I needed to over explain details, which consumed my time. Several times during the project, he would stray and fail to provide me updates, which required me to send reminders or to follow up with him. Sometimes I would bypass him and seek out his staff. I spent more time coaching him than I did with other O4s or O3s. I had several discussions with him regarding this and he understood or provided excuses. During my routine discussions with the Deputy, he sometimes shared similar experiences while LCDR [Applicant] worked projects as the unit safety manager.

Note: Paragraph 5b of LCDR [Applicant's] memo mentions he took action against one of the civilian marine inspectors, which is supported in enclosure (9) of his package. This is accurate, except it occurred during marking period 1 May 2019 to 30 Apr 2020. I attached LCDR [Applicant's] 2020 OSF (see bullets 12 and 28). I recommend the board strike this from consideration since it did not occur during this period.

e. **Note:** Paragraph 5e of LCDR [Applicant's] memo references enclosure (11) of his package. This occurrence was a simple misunderstanding that was resolved quickly. This occurred during 1 May 2019 to 30 Apr 2020 marking period, so I recommend the board strike this from consideration since it did not occur during this period.

f. **Comparison:** The OER he is contesting was the first received from me. During the same marking period, I recommended a “5” on the comparison scale for another O4 who worked directly for me that had similar responsibilities, because that member’s performance was stronger and was a better leader. When a problem arose, that O4 provided options and recommendations, which quickly earned the trust of senior leadership. LCDR [Applicant] often presented problems for me to solve, which led me to seek options and a recommendation. This mostly continued for two years, despite my conversations with him. It’s also worth noting, that he improved during the next marking period and received a “5” in the comparison scale.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 1st day of September 2020.

- I, CAPT [S], United States Coast Guard, declare as follows, pursuant to Title 28 United States Code §1746:

1. I am currently stationed at Sector [redacted] filling the Sector Commander position. Previous to this assignment, I was stationed at Sector [redacted] filling the Deputy Sector Commander position and held that position from 01NOV17 to 30APR20. It was in this position, Deputy Sector Commander where I served as Reporting Officer to LCDR [Applicant] beginning on 02JUL18.

2. Before addressing LCDR [Applicant’s] comparison scale mark on his 2019 OER, I’d like to provide comments in response to his claim that I “failed to perform required responsibilities as mandated.” In LCDR [Applicant’s] OER Comparison Scale Correction Request dated 23JUL20 he stated that I failed to:

(1) “Evaluate performance based on direct observation and other reliable reports and records.” I am surprised to hear this since in numerous instances throughout the marking period I worked with LCDR [Applicant] directly. For instance, he filled in for his supervisor CDR [B], as Acting Prevention Department Head for 29 days (01-05AUG, 06-08OCT, 03-05NOV, 19-26DEC, 01-05MAR, and 25-28APR) throughout the marking period where he worked for and engaged with me directly including providing daily briefings to me and the Sector Commander. In addition to his time as Acting Prevention Department Head, he held projects and collateral duties where he reported directly to me (i.e.. Safety Coordinator and project manager for a Liquefied Natural Gas first responder conference he and I hosted for Coast Guard and other first responders). I used this direct observation along with other input including his Officer Support Form to make my determination with regards to his comparison scale marking.

(2) “Provide timely performance feedback during and at the end of the reporting period.” I again am surprised to hear this. There were many instances throughout this marking period where LCDR [Applicant] and I spoke about his performance and leadership challenges with regards to both his primary and collateral duties. While I did informally recognize him via emails in many instances for good performances, there were many times where he and I discussed performance issues and concerns face to face however none of the instances rose to the level warranting formal actions.

3. LCDR [Applicant] generally met most performance standards but it did not come without much coaching well beyond what a LCDR should require. As mentioned above, I worked with him directly in numerous instances throughout the 2019 marking period, and rarely, if ever, would I say he exceeded expectations. Time and time again, I and his supervisor would have to redirect him on his actions. He would routinely misinterpret my guidance or unnecessarily create anxiety in situations that he should have been able to resolve without getting everyone worked up. Evaluating our officers is always difficult, as so many are high performing and it is difficult to mark one above another, in this case, I had no difficulty in giving LCDR [Applicant] a mark of 4 in the comparison scale. LCDR [Applicant] clearly performed below those of his peers. Those that he worked alongside were running circles around him (exceeding with primary duty, collaterals, and taking initiative to be engaged/involved). While a nice person and one who tried hard to care for his staff, LCDR [Applicant] struggled with articulating the end goals and taking the right action to get the

job done. Throughout my career, I don't recall giving many marks of 4 in the comparison scale but in this case, I did so deliberately. I believe my comparison scale history speaks for itself. I am of the opinion that a mark of 5 in the comparison scale should be reserved for those that always met and sometimes exceeded expectations, a mark of 6 should be reserved for those that often exceed expectations, and a mark of 7 should be reserved for those that consistently, time after time, exceed[ed] expectations in a variety of ways. While the 7 point comparison scale marks is not explicitly explained in PCS INST M 1611.1, a similar 7 point scale for general performance dimensions is and notes that a mark of 4 is "standard" and that the member "met performance standards." LCDR [Applicant's] mark of 4 in the comparison scale is justified by his performance and changing that mark to a 5 would be unfair to his colleagues who did exceed expectations and justifiably received a 5. Additionally altering the mark will make it difficult for future boards/panels to separate those meeting from those exceeding expectations.

4. Of additional note, several of the achievements he and his subordinates/colleagues detailed in the OER Comparison Scale Correction Request were not from the 2018-2019 marking period in question. LCDR [Applicant] did make some improvements during the 2019-2020 marking period and was marked accordingly for that period in his 2020 OER.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 03 day of September 2020.

- I, CAPTAIN [G], United States Coast Guard, declare as follows, pursuant to Title 28 United States Code §1746:
 1. I am presently the Commander for Sector [redacted] and assumed command in May of 2018.
 2. My relationship with LCDR [Applicant] is that I am his Commanding Officer as well as his Reviewer for OER purposes.
 3. In regard to LCDR [Applicant] Personnel Record Review Board Application, I have read his OER comparison Scale correction as well as his OER from the period 02Jun2018 to 30Apr2019 and believe the OER accurately captures his performance over the period and should not be changed in any way. Based upon my 28 years of experience as an officer in the United States Coast Guard and comparing him with other LCDRs that I have known throughout my career, I strongly feel the officer comparison mark is accurate and justified and there is no material error. In my opinion, he is indeed one of the many high performing officers who form the majority of this grade and I do not believe this mark has a negative connotation as LCDR [Applicant] states. LCDR [Applicant] has done good work while here and I especially appreciate all that he has done to revitalize the safety committee and make things safer for our personnel and subunits.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 8th day of September 2020.

THE APPLICANT'S ALLEGATIONS

The applicant argued that the contested sections of his OER are inaccurate for four specific reasons: 1) the sworn declarations provided by his Supervisor and Reporting Officer in response to his PRRB application are inaccurate; 2) the marks he received in the contested performance dimensions do not accurately reflect his performance during the applicable rating period; and 3) the mark in the fourth spot of the Comparison Scale does not align with the comments written in section 5.d. of the OER.

Objections to PRRB Sworn Declarations

To support his application, the applicant submitted a 13-page, single-spaced, personal statement. The applicant spent almost the entirety of this personal statement attacking the statements made not in his OER, but in the sworn declarations to the PRRB.

To contest these statements, the applicant repeatedly referred to previous subordinates' statements, whom he solicited comments from after he received his contested OER. For example, the applicant started by contesting a statement made by his supervisor, CDR B, in his sworn declaration, wherein CDR B stated, "LCDR [Applicant's] leadership was not valued by his subordinates. He was a friend to them, they did what he needed and he supported their personal needs, but he was viewed as a middle person and lacked decisiveness, consistency and fortitude to own and sell difficult decisions, especially to the veteran marine inspectors." The applicant refuted CDR B's statement by referencing an email from a previous subordinate who stated, "You did not micromanage, and gave me room to run my branch effectively, in my own style. I never considered us peers or friends, though I respect you and believe we had a really excellent working relationship. In my experience, you had a lot of trust in your people and gave them the autonomy to make decisions/recommendations that you supported."

The applicant further contested CDR B's statement, "Several times during the project, he would stray and fail to provide me updates, which required me to send reminders or to follow up with him. Sometimes, I would bypass him to seek out his staff. I spent more time coaching him than I did with other O4s or O3s. I had several discussions with him regarding this and he understood or provided excuses." According to the applicant, evidence and the record shows that CDR B entrusted him with 14 projects while CDR B was away from the unit. To support his claim, the applicant quoted an email from CDR B, wherein CDR B stated, "[Applicant], this was a fantastic idea! Keeping this log helped me get back up to speed and I truly appreciate you covering while I was on leave. Now that [redacted] has set the bar high, this is what I'll be expecting while y'all cover." The applicant stated that during the Maritime Security Training and Exercise Program (AMSTEP) full-scale exercise, a highly visible event, he was entrusted to cover for CDR B as Operations Section Chief, even though he was not qualified. To support his claims that CDR B's statements were inaccurate, the applicant cited to approximately twelve different emails from CDR B wherein he expressed his gratitude for the applicant's work and contributions. The applicant explained that he believed that CDR B appreciated his performance during the evaluation period, citing another four emails the applicant received from CDR B. The applicant further stated that he was really surprised and felt distraught after he received the contested OER.

The applicant also contested CDR B's statement that he had recommended a mark in the fifth spot on the Comparison Scale to another LCDR who had worked for CDR B and who had similar responsibilities to the applicant. The applicant stated that while he agrees that the other LCDR was a high performer and trusted peer, he disagreed that the two of them had similar responsibilities. According to the applicant, the other LCDR supervised 10 enlisted members and one warrant officer during the rating period in question, but he supervised 6 Junior Officers (JO), 5 Chief Warrant Officers (CWO), 7 enlisted members, and 6 civilians, not to mention a very demanding collateral duty as a Sector Safety Manager. In addition, this other LCDR stated that she personally saw the applicant leading the unit's largest division through several complicated

and challenging situations. Moreover, the applicant argued that if you compare CDR B statement in his sworn declaration to the comments written on his OER, the two contradict each other.

The applicant also refuted the sworn declaration made by his Reporting Officer (RO) submitted in response to the applicant's PRRB application. Specifically, the applicant contested the RO's statements, "There were many times where he and I discussed performance issues and concerns face to face however none of the instances rose to the level of warranting formal actions," and "Those that he worked alongside were running circles around him (exceeding with primary duty, collaterals, and taking initiative to be engaged/involved)." The applicant stated that just as he is required to prove to this Board, by a preponderance of the evidence, that an error or injustice occurred, he requested that the RO be required to do the same to prove the statements in his sworn declaration are true. He requested that the RO be required to provide examples to support the statements made in his sworn declaration. According to the applicant, the only time he officially discussed his OER with his chain of command was to plead his case that his Comparison Scale mark should be raised from the fourth spot to the fifth. In addition, the applicant pointed to nine emails he received from the RO wherein he praised the applicant for taking initiative in certain situations. The applicant argued that these emails and praise prove that he did take initiative and worked with other departments and units as well as completed projects.⁴ The applicant also referenced a statement submitted by his former subordinate who praised the applicant's job as the unit's Safety Manager.

Objections to OER

The applicant argued that his supervisor's statement wherein he informed the applicant that he needed more bullet points from the applicant because the applicant "[d]idn't mention a single thing about the shutdown...a lot of your bullets are vague," was completely false. The applicant claimed that the Officer Support Form (OSF) provided in conjunction with his OER had the following wording for the "Professional Presence" section: "Represented unit during community outreach to support CG families after 35-day government shutdown; advocate of helping the community by occasionally donating blood through the local blood banks; donated HHGs and clothing to local charity organizations; brought immense credit to unit/CG while strengthening local community." The applicant explained that he also provided an additional bullet for his Supervisor that stated, "Incredible resilience during the 2018-2019 lapse of appropriations. As CPREV, aided 7 JOs, 5 CWOs, 12 POs, & 7 Civilians in identifying and solving pay issues. Met personal and mission demands day and night and on weekends without failure, keeping a strong and resilient workforce." Finally, the applicant stated that he provided additional bullets for his supervisor to reference that met the mark of 6 in the contested performance dimensions.⁵

The applicant argued that his Reporting Officer's comments about his leadership and potential on the OER do not align with the mark in the fourth spot of the Comparison Scale and

⁴ The applicant continued to focus his arguments and allegations on the sworn declarations submitted by his rating chain in response to the PRRB application and not on the OER itself. However, the applicant has not argued that the PRRB failed to execute its duties in accordance with policy. Moreover, the PRRB application process, including the burden of proof required, is separate and distinct from this Board. Accordingly, the Board will not take additional time here to address each and every complaint the applicant had with his rating chain's PRRB sworn declarations.

⁵ These bulleted comments were included in the applicant's requested relief.

support a mark in the fifth spot instead. For example, the applicant argued that his Supervisor's comment that he "Skillfully balanced competing demands; developed strategies with contingency plans," is equivalent in nature to his RO's comment that he "Expertly balanced primary duties with assigned demanding unit safety manager collateral duty; extremely versed in workplace hazard assessments, mishap investigations & contingency preparedness," but the Supervisor's comment supported a mark of 6 for Planning and Preparedness, while the RO gave him a mark in the fourth spot on the Comparison Scale. The applicant stated that another example is the mark of 6 for the "Teamwork" performance dimension, found in Section 3b of the OER, supported by the comment that he was a "major contributor to team effort; established relationships and networks across a broad range of people and groups, raising accomplishments of mutual goals to a remarkable level." Likewise, the applicant noted, his RO wrote that he was "a focused and driven officer that empowers the team while showcasing a broad range of technical expertise and decision-making ability," but assigned him a mark in the fourth spot on the Comparison Scale instead of the sixth.

Regarding the "Looking out for Others" performance dimension, found in Section 3b of the OER, the applicant argued that the comments, "actively contributed to achieving balance among unit requirements, professional and personal responsibilities," are equivalent to, "executed duties & responsibilities achieving operational success across the nation's fourth largest port," which were written by the RO.

The applicant argued that covering for his Supervisor as the Acting Prevention Department Head for 29 days was a big deal and would have been entrusted only to someone trusted to run and lead the department. The applicant alleged that the comment, "consistently exercises sound judgment, rapidly assesses situations & makes exceptional personnel management decisions benefitting all stakeholder involved," found in his OER does not support a mark in the fourth spot on the Comparison Scale, but a mark of in the fifth spot. To support his claims, the applicant pointed to a statement from a coworker who wrote that he was "stunned" that the applicant received a mark in the fourth spot of the Comparison Scale. Specifically, the coworker stated, "Wow I am surprised to hear that. I don't agree that you are in the 4 realm."

The applicant also contested a statement made by his Reviewer in the Reviewer's sworn declaration to the PRRB, wherein he stated, "In my opinion, he is indeed one of many high performing officers who form the majority of this grade and I do not believe this mark has a negative connotation as LCDR [Applicant] states." According to the applicant, a mark in the fourth spot on the Comparison Scale is known as a "center punch" in the officer community and draws the attention of the selection boards and panels. The applicant alleged that many senior officers that he solicited advice from, explained that a "center punch" is like a "code red" from the movie *A Few Good Men*, and although not found in any regulation or manual, is a practice that currently exists to draw a negative connotation to an individual coming up for any promotion board.

To support his application, the applicant submitted more than sixty exhibits. He submitted many supportive statements from colleagues and subordinates, which he solicited by email with the following language:

During my first year as Chief of Inspections, I ran into many challenges to get back into the saddle as a Preventions Officer after being away for 6 years. However, I did the best I could to support the mission and

personnel in the [redacted] AOR and neighboring sectors. However, my immediate supervisor believed that I met a 4 in the potential block of the April 2019 OER.

I am writing to you because I am requesting sincere feedback. Do you believe that during 02 June 2018 to 30 April 2019, my interaction with you and/or your personnel was to that level? Did I lack in supporting you during the time we worked together in any project or had duties together? I must know so that I can improve in the why [*sic*] I do things from here on out.

VIEWS OF THE COAST GUARD

On October 18, 2022, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the PSC.

The JAG argued that the applicant failed to provide sufficient evidence to meet the standard for the correction of an OER. The JAG argued that under *Hary v. United States*,⁶ the applicant must do more than merely allege or prove that an OER seems inaccurate, incomplete, or subjective in some sense. The applicant must demonstrate, by competent evidence (1) a misstatement of a significant hard fact, (2) clear violation of specific objective requirement of statute or regulation, or (3) factors adversely affecting the ratings which had no business being in the rating process.⁷

In the instant case, the JAG argued that the applicant invoked the first *Hary* prong by arguing numerous statements by his supervisor and RO were misstatements of significant hard facts. However, the JAG stated that the statements the applicant has contested are not statements contained in the contested OER, but were statements the applicant's rating chain provided to the PRRB. Accordingly, the JAG claimed the applicant failed to adequately prove that any of the comments contained in his OER were misstatements of significant hard fact. In addition, the JAG argued that the applicant arguments that his numerical marks should be raised does not sufficiently prove that there are any erroneous statements or facts within his evaluation. The JAG further argued that the statements made by the applicant's supervisor and RO, and challenged by the applicant, are not significant hard facts, but reflect the judgment of the supervisor and RO, which are inherently subjective. The JAG explained that while the applicant's supervisor did endorse raising the applicant's mark in "Using Resources," the applicant's supervisor justified this endorsement on the belief that the applicant provided new, supplemental information. However, according to the JAG, the applicant's supervisor had already seen the supplemental information provided by the applicant in his ROO Reply and recommended against raising the applicant's marks at that time. Accordingly, the JAG argued that raising the applicant's marks now would be contrary to *Paskert v. United States* and the Board's decision in 2018-188, because it would amount to retrospective reconsideration that should not be given much weight.⁸ Therefore, the JAG stated that while the applicant may disagree with his supervisor's and RO's observations and assessments, the applicant failed to provide sufficient evidence to demonstrate that any of the comments contained in his contested OER were misstatements of significant hard fact as required by *Hary*.

⁶ *Hary v. United States*, 223 Cl. Ct. 10, 18, 618 F.2d. 704, 708 (1981).

⁷ *Id.*

⁸ *Paskert v. United States*, 20 Cl. Ct. 65, 75 (1990) (finding that "[a]fter the fact [non-selection] statements by raters contending that they scored the applicants too low on their OER's are not to be given great weight.")

The JAG noted that the applicant failed to take certain key steps afforded by policy to challenge the marks of 5 contained in his OER. Although the applicant initially raised the issue with his marks of 5 in his ROO Reply, as authorized by policy, he failed to raise this issue in his request for relief to the PRRB, where he only contested his Comparison Scale mark. The JAG argued that this failure is informative, indicating that the applicant did not believe the marks of 5 were erroneous or unjust when he applied to the PRRB.

The JAG explained that next, the applicant appeared to invoke the second *Hary* prong, when he argued that the mark in the fourth spot on the Comparison Scale did not match the comments of the Reporting Officer in the OER. The JAG further explained that while an inconsistency between the mark and the comments could be construed as erroneous, the applicant failed to adequately prove a mismatch. The JAG claimed that the applicant's sole basis for arguing that there is incongruity between the marks and the comments is his belief that a mark in the fourth spot on the Comparison Scale is subpar, but it actually represents that the applicant is "One of many high performing officers who form the majority of this grade." According to the JAG, this is not a subpar mark. The JAG argued that the applicant's personal belief of how this mark may be perceived, fails to prove that the mark is erroneous and not in alignment with the Reporting Officer's comments. The JAG explained that the applicant's rating chain, on numerous occasions, attested to the fact that the marks and comments contained within the applicant's OER accurately reflect the applicant's performance.

The JAG further explained that the third *Hary* prong requires that the applicant present evidence of factors adversely affecting the rating that had no business being in the rating process. The JAG stated that case law is relatively sparse on enumerating what particular "factors" count for the purposes of this prong, but at least one case has stated that bias and personal animosity are such factors.⁹ The JAG claimed that the third *Hary* prong is not implicated by the applicant. Consequently, the JAG argued that the applicant failed to prove that at least one of the *Hary* prongs was offended and has also failed to overcome the presumption that the Coast Guard and its officials, in particular the applicant's rating chain, failed to discharge their duties correctly, lawfully, and in good faith.¹⁰ Accordingly, the JAG argued that the applicant's request for relief should be denied.

To support its advisory opinion, the Coast Guard submitted the following sworn declaration from the applicant's chain of command:

- I, Captain [B], United States Coast Guard, declare as follows, pursuant to Title 28 United States Code § 1746:

1. I'm currently assigned as the Office Chief for the Office of Operations and Environmental Standards, CO MDT (CG-OES) at Coast Guard Headquarters in [redacted]. At the time of the observation, I was the Prevention Department Head at Sector [redacted] and was the direct supervisor for LCDR [Applicant].

⁹ *Guy v. United States*, 221 Ct. Cl. 427, 433 (1979) ("The process of evaluating officers by other officers is an inherently subjective process which neither the military boards nor this court will interfere with unless there is clear and convincing evidence of factors adversely affecting the ratings which had no business being in the rating process. Though the bias and personal animosity of rating officers are such factors...").

¹⁰ *Arens v. United States*, 969, F.2d 1034, 1037 (1992).

2. I read the provided material for LCDR [Applicant's] application for correction of military record. The declaration I provided for the PRRB is still valid. Below is amplifying information regarding his request to change marks of "5" in performance dimensions 3.a.b, 3.a.e, 3.a.f, 3.b.e, and 3.c.d to a "6."

3. Performance Dimension 3.a.b (Using Resources): LCDR [Applicant] makes a valid point for this area. In paragraph 29.a of his memo, he provided a bullet to support "Using Resources," which focused around the government shutdown. That was a significant event and I'm surprised I did not include this in this evaluation. He was not able to use the civilian staff due to the shutdown, so he resorted to clever ideas to ensure the inspections were completed. Given this point, I support changing this mark from a "5" to a "6."

4. Performance Dimension 3.a.e (Professional Competence): I reviewed LCDR [Applicant's] points mentioned in the memo, but have a different perspective. There was no specific incident I can link to for marking him at "5." The mark was based off several observations and interactions. As per the OER, a mark of "6" is warranted if ALL the following criteria is met: *"Superior expertise; advice and actions showed great breadth and depth of knowledge. Remarkable grasp of complex issues, concepts, and situation. Rapidly developed professional growth beyond expectations. Vigorously conveyed knowledge, directly resulting in increased workplace productivity. Insightful knowledge of own role, customer needs and value of work."* The bullet LCDR [Applicant] provided in paragraph 29.b doesn't meet the criteria in my opinion. LCDR [Applicant] was not the "sole qualified Hull Inspector" at the unit. There were at least two others at the unit. Our unit only needed a hull inspector once or twice a year, so the impact wasn't significant enough to support a "6." The remaining information in the provided bullet and my observations don't support development of professional growth beyond expectations. I recommend the board support the mark of "5" for this area.

5. Performance Dimension 3.a.f (Speaking and Listening): I reviewed LCDR [Applicant's] points mentioned in the memo, but have a different perspective. There was no specific incident I can link to for marking him at "5." The mark was based off several observations and interactions. As per the OER, a "6" is warranted if ALL the following criteria was met: *"Clearly articulated and promoted ideas before a wide range of audiences; accomplished speaker in both formal and extemporaneous situation. Adept at presenting complex or sensitive issues. Active listener; remarkable ability to listen with open mind and identify key issues."* In paragraph 25 of the memo, there's a comment regarding his accent. At no time did his accent impact our communications. My concerns resided in the "Listening" portion of this dimension. The bullet LCDR [Applicant] provided in paragraph 29.c doesn't meet the criteria for a "6" in my opinion. Paragraph 2.c of my PRRB declaration justifies my mark of "5." I recommend the board support the mark of "5" for this area.

6. Performance Dimension 3.b.c (Workplace Climate): I reviewed LCDR [Applicant's] points mentioned in the memo, but have a different perspective. Paragraph 2.b of my PRRB declaration justifies my mark of "5." I mentioned that he complained to his subordinates about his workload. This, at times, did not promote a positive work environment. On two separate occasions, a subordinate of LCDR [Applicant] came into my office and expressed their disapproval of LCDR [Applicant] openly complaining and were concerned for him. I recommend the board support the mark of "5" for this area.

7. Performance Dimension 3.c.d (Professional Presence): I reviewed LCDR [Applicant's] points mentioned in the memo, but have a different perspective. There was no specific incident I can link to for marking him at "5." The mark was based off several observations and interactions. As per the OER, a mark of "6" is warranted if ALL the following criteria is met: *"Always self-assured, projected ideal CG image. Poised in response to others' provocative actions. Contributed leadership role in civilian/military community. Exemplified and held other accountable for the core values and finest traditions of military customs and protocol. Meticulous uniform appearance and grooming; inspired similar standards in others."* The bullet LCDR [Applicant] provided in paragraph 29.e doesn't meet the criteria in my opinion. The justification I provided in my PRRB declaration justifies my mark of "5" in this area. I recommend the board support the mark of "5" for this area.

8. Comparison Scale: Compared to other O4s I worked with and supervised at the unit, LCDR [Applicant] required a lot of guidance and coaching to achieve the end goal. The Reporting Officer and I provided a lot positive praising and some informal counseling to achieve the desired goal. I do not contest the numbers of

the staff LCDR [Applicant] led and the responsibilities he was assigned. LCDR [Applicant] juggled a lot, but no more or less than other O4 division officers. When compared to other O4s at the unit and within my department, I see things differently than his overall message in his BCMR memo. LCDR [Applicant] had two direct reports, the Assistant Chief of Inspections Division (ACID), who is mentioned in his BCMR memo and the Marine Inspector Training Officer (MITO). The ACID supervised the branch chiefs, who then supervised the inspection staff and the MITO managed training for the entire division. Plus, he had the Safety Manager collateral, given his HSWL background. Another division I oversaw had more folks to supervise and multiple responsibilities. This division was led by a junior O4 who did an exceptional job of balancing the high demand of primary duties with challenging collateral duties. This O4 had three direct reports with a staff of 9 people and oversaw 4 subordinate units: 3 Aids to Navigation Teams (each consisting of 8-15 people) and 1 Construction Tender Cutter (consisting of a crew of 15 people). Despite having a larger overall staff, this division was significantly understaffed for the work that needed to be completed, resulting in this O4 not being able to delegate. While balancing this workload, this O4 also volunteered to run the Leadership and Diversity Advisory Committee, serve as a sexual assault victim advocate, and was an active member on two industry led committees. Additionally, this O4 filled in as the acting Department Head equally as many times as LCDR [Applicant]. I rarely needed to follow up with this O4 and did not spend a lot of time explaining things. When faced with a problem, this O4 either addressed the issue or presented an alternative. That said, this O4 outperformed LCDR [Applicant] in work performance and in leadership qualities and was regarded as one of the top O4s at the unit by senior leadership.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 3rd day of May 2022.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 25, 2022, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited him to respond within thirty days. The Chair received the applicant's response on January 11, 2023.

The applicant argued that contrary to the Coast Guard's advisory opinion, he did prove that his rating chain violated the first *Hary* prong. For example, the applicant argued that the first *Hary* prong is clearly implicated by his supervisor's admission that "LCDR [Applicant] makes a valid point for this area. In paragraph 29.a. of his memo, provided a bullet to support 'Using Resources,' which focused around the government shutdown. That was a significant event and I'm surprised I did not include this in my evaluation. He was not able to use the civilian staff due to the shutdown, so he resorted to clever ideas to ensure the inspections were completed. Given this point, I support changing his mark from a 5 to a 6." The applicant argued that regardless of how many times his supervisor reviewed this information, he pointed out the government shutdown twice and at least twenty-five days before the end of the period. According to the applicant, the fact that his supervisor finally accepted his performance during one of the most crucial times in government, clearly shows that his supervisor did not accurately evaluate his tireless efforts to support unit members. The applicant alleged that he took calls from civilian personnel, in addition to active duty personnel, in the middle of the night and early morning for 35 days straight. The applicant argued that the documentation he provided to his supervisor prior to his OER being validated was not vague, it was just not taken into consideration. The applicant claimed that this failure was because he was not valued or considered equal to other officers who received better evaluations.

The applicant claimed that the first *Hary* prong was also violated when his supervisor attributed a certain position to the wrong individual in his second sworn declaration. The applicant alleged that the LCDR his supervisor claimed held the Leadership and Diversity Advisory Committee Chair position, actually belonged to a Lieutenant (LT), not the LCDR claimed by his supervisor. In essence, the applicant argued that his supervisor was giving credit where credit was not due.¹¹

Following this argument, the applicant again began to contest the comments made by his supervisor in the supervisor's sworn declaration. The applicant did not attack the actual statements in his OER, but instead focused his allegations of error and violations of the *Hary* prongs on the comments in the supervisor's sworn declaration. However, the *Hary* prongs do not apply to comments made in sworn declarations but to the comments made in the OER itself. In addition, and as stated in a previous footnote, the Board does not have jurisdiction to correct comments made in a sworn declaration. The Board's jurisdiction is limited to the correction of a Coast Guard member's official record. A sworn declaration is not a part of the applicant's official record and is therefore outside the jurisdiction of this Board. Accordingly, the Board will not continue to summarize the applicant's claims and allegations regarding his supervisor's sworn declaration. To do so would be contrary to the Board's role in this process and create an untenable and confusing precedent moving forward. Therefore, the Board will only summarize the applicant's claims and allegations that are relevant to the applicant's contested OER.

The applicant acknowledged the Coast Guard's argument that the applicant only requested an increase in his Comparison Scale mark when he applied to the PRRB and failed to request an increase in the other marks he now contests. However, the applicant explained that he was dealing with personal hardship at the time and opted to concentrate his efforts in discussing the Comparison Scale mark from the RO. The applicant further explained that although contesting the "Comparison Scale" mark on his OER to the PRRB was his main focus, it does not mean that his ROO Reply was invalid. The applicant claimed that after he received backlash from his supervisor and RO, it motivated him even more to search for the truth. According to the applicant, it was after receiving legal counsel and the opinions of other senior officers who faced the same atrocities that he changed his requested relief and his application to this Board is more robust.

The applicant alleged that his supervisor violated the second *Hary* prong when he admitted in his sworn declaration that he compared the applicant's performance to that of other officers who were performing the same duties. The applicant argued that pursuant to Article 4.E.2.f. of the Officer Evaluation System Procedures Manual, PSCINST M1611.1D, which states, "For each evaluation area, the Supervisor reviews the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor must carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. The Supervisor must take care to compare the officer's performance and qualities against the standards — not to other officers and not to the same officer in a previous reporting period." The applicant alleged that this Coast Guard policy makes it clear that his supervisor's statement in his sworn declaration regarding the applicant's Comparison Scale mark was a clear violation of policy. The applicant alleged that his supervisor's

¹¹ The Board will note here that the comments contested by the applicant were not contained in the applicant's OER, but in the subsequent sworn declaration submitted by his supervisor in response to the Coast Guard's advisory opinion.

comparison of the applicant to other officers performing the same duties placed him at a disadvantage when his rating chain prepared his OER. The applicant argued that he was supposed to be evaluated against the standards, not other officers.

Next the applicant claimed that his RO violated the third *Hary* prong when he intentionally gave him a low mark in the fourth spot on the Comparison Scale. According to the applicant, the RO violated Article 19.B.3. which states that a factor that can distort an OER is “Low Appraiser Motivation” which takes place when “the evaluator knows that a poor appraisal could significantly hurt the employee’s future, particularly opportunities for promotion or selection, the evaluator may be reluctant to give a realistic appraisal.” The applicant alleged that his RO deliberately gave him a low Comparison Scale mark to significantly hurt his career. The applicant cited *Quinton v. United States*,¹² which states, “The Board was inconsistent in its treatment of 4s. In some instances, 4s were acceptable marks and not a barrier to promotion. Other times, however, 4s were fatal to [plaintiff’s] prospects for promotion. In this case, such inconsistency rendered the Board arbitrary and capricious.” The applicant alleged that this case proves that giving a service member a mark of 4 is a confusing message to a promotion board and will not be looked at favorably by any board.

The applicant contested the Coast Guard’s claim that he did not provide additional evidence indicating that his Supervisor did not accurately assess his performance against the prescribed standards and his Supervisor’s marks were within policy based on all evidence and are supported within the OER. According to the applicant, he has proven that his Supervisor utilized the “First Impression”¹³ bias outlined in policy when his Supervisor prepared the applicant’s OER, because his Supervisor discounted information that was clearly presented in the applicant’s OSF, PRRB application and BCMR application. The applicant also recited his claims that the RO violated the “Low Appraiser Motivation.” The applicant alleged that his RO failed to conduct performance feedback or counseling sessions during and after the marking period. The applicant alleged that his Supervisor and RO are unable to provide negative feedback for his performance, while he has provided proof and continues to provide proof of his positive performance.

The applicant argued that under *Sanders v. United States*,¹⁴ the Court held that, “The documents which are sent to a Selection Board for its consideration therefore must be substantially complete, and must fairly portray the officer’s record. If a Service Secretary places before the Board an alleged officer’s record filled with prejudicial information and omits documents equally pertinent which might have mitigated the adverse impact of the prejudicial information, then the record is not complete, and it is before the Selection Board in a way other than as the statute prescribes.” The applicant stated that in other words, if his June 2, 2018, through April 30, 2019, OER does not portray an accurate picture of his performance, then it should either be fixed or eliminated from his official record.

The applicant explained that he has been passed over for Commander (O-5) twice and he firmly believes the reason he has been passed over is because of the marks of 5 he received, but

¹² *Quinton v. United States*, 64 Fed. Cl. 118, (Fed. Cir. 2005).

¹³ The “First Impression” bias is outlined in an article submitted by the applicant titled, “Evaluating our Evaluations: Recognizing and Countering Performance Evaluations Pitfalls.” The article states that this bias stems from initial impressions, either favorable or unfavorable, that influence a rater’s evaluation.

¹⁴ *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979).

more importantly, “center punch” he received on the Comparison Scale. The applicant argued that in *Sanders v. United States*,¹⁵ the Court stated, “Although plaintiff’s record steadily improved with accumulation of good OERs, he was passed over again for temporarily promotion to major by a selection board which considered the detrimental OERs before they were removed from his file.” The applicant further cited to *Hary v. United States*,¹⁶ where the Court stated, “As noted above, the presence of passovers in a record is a grave handicap to an officer’s promotion opportunities.”

Next, the applicant pointed to multiple OERs that he has prepared in order to give the Board his perspective on how he evaluated his subordinates compared to how his supervisor and RO evaluated him. However, the applicant never contested his mark for “Evaluations,” nor was his work ever questioned by his supervisor or RO. Therefore, the Board will not summarize the applicant’s approach to evaluating his subordinates because his approach, whether similar or different to his supervisor and RO, does not establish or prove that an error or injustice occurred in the execution of the applicant’s contested OER. Accordingly, the Board will not summarize the applicant’s arguments here.

The applicant alleged that he felt discriminated against by his Supervisor so he filed an official complaint. The applicant claimed that his Supervisor, CDR B, called him names like, “not Fonzie enough,” “rusty,” and “puppet.” However, after his Supervisor apologized to him, the applicant alleged that he cancelled his complaint because he believed in working through his problems with others. The applicant further alleged that the OER he received after the contested OER was more gracious with his marks because of the retaliation complaint he filed. The applicant stated that his chain of command did not want him to file another complaint.

APPLICABLE LAW AND POLICY

Title 14 U.S.C. § 2120(b) provides the following guidance on Special Selection Boards:

(b) Officers considered but not selected; material error.

(1) In general. In the case of an officer or former officer who was eligible for promotion, was considered for selection for promotion by a selection board convened under section 2106, and was not selected for promotion by that board, the Secretary may convene a special selection board to determine whether the officer or former officer should be recommended for promotion, if the Secretary determines that –

(A) an action of the selection board that considered the officer or former officer –

(i) was contrary to law in a matter material to the decision of the board; or

(ii) involved material error of fact or material administrative error; or

(B) the selection board that considered the officer or former officer did not have before it for consideration material information.

¹⁵ *Id.*

¹⁶ *Hary*, 223 Cl. Ct. 10, 18, 618 F.2d. 704, 708 (1981).

(2) Effect of failure to recommend for promotion. If a special selection board convened under paragraph (1) does not recommend for promotion an officer or former officer, whose grade is that of commander or below and whose name was referred to that board for consideration, the officer or former officer shall be considered –

(A) to have failed of selection for promotion with respect to the board that considered the officer or former officer prior to the consideration of the special selection board; and

(B) to incur no additional failure of selection for promotion as a result of the action of the special selection board.

Article 5 of The Coast Guard Officer, Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A (September 2013), provides the following guidance on the Officer Evaluation System (OES):

Article 5.A.1.a. Purpose. This Chapter states policies and standards for conducting performance evaluations for Coast Guard officers.

The OES has been designed to:

- (1) Provide information for important personnel management decisions. Especially significant among these decisions are promotions, assignments, career development, and retention,
- (2) Set performance and character standards to evaluate each officer,
- (3) Prescribe organizational values by which each Coast Guard officer can be described, and
- (4) Provide a means of feedback to determine how well an officer is measuring up to the standards.

...

Article 5.B.5. For this Chapter, commanding officers include area and district commanders, commanders of logistics/service centers, commanding officers of Headquarters units and subordinate units or organizations, and cutters. Commanding officers must:

- a. Ensure accurate, fair, and objective evaluations are provided to all officers under their command. In using the OER, strict and conscientious adherence to specific wording of the standards is essential to realizing the purpose of the evaluation system.

...

Article 1 of the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1C, provides the following guidance on the role of the rating chain in the officer evaluation process:

...

Article 1.A. The Rating Chain. The rating chain provides the assessment of an officer's performance and value to the Coast Guard through a system of multiple evaluators and Reviewers who present independent views and ensure fairness, accuracy and timeliness of reporting. It reinforces decentralization by placing responsibilities for development and performance evaluation at the lowest levels within the command structure. The rating chain consists of the Reported-on Officer, the Supervisor, the Reporting Officer, and the Reviewer (if applicable).

...

Article 4.E.2. Section 3, Evaluation.

...

f. For each evaluation area, the Supervisor reviews the Reported-on Officer’s performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor must carefully read the standards and compare the Reported-on Officer’s performance to the level of performance described by the standards. The Supervisor must take care to compare the officer’s performance and qualities against the standards — not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer’s performance and qualities during the marking period, the Supervisor selects the appropriate circle on the form. Refer to Table 4-2 below and Chapter 19 in determining the appropriate mark to assign to each performance dimension. Inflationary markings dilute the actual value of each evaluation, rendering the OES and the OER itself ineffective.

MARK	MEANS THE MEMBER CONSISTENTLY
1	(Derogatory) – Met all the written performance standards in the “2” level and the rater considered the impact severely detrimental to the organization or to others.
2	(Below standard) – Met all the written performance standards in this level.
3	Did not meet all the written performance standards in the “4” block.
4	(Standard) – Met all the written performance standards for this level and none in the “6” level.
5	Met all the written performance standards in the “4” level and at least one of those in the “6” level.
6	(Above Standard)– Met all the written performance standards for this level and did not exceed any of them.
7	Met all the written performance standards in the “6” level and exceeded at least one of them.

...

Article 4.E.2.h. Comments Required for CG-5310A and CG5310C.

1. In the “comments” block following each evaluation area, the Supervisor includes comments citing specific aspects of the Reported-on Officer’s performance and behavior. Well-crafted comments may apply to more than one dimension. Decreased comment space will require concise yet readable supporting verbiage and allow more flexibility to comment on significant performance. The Supervisor draws on their observations, those of any secondary Supervisors, and other information accumulated during the reporting period.

2. A mark of four represents the expected standard of performance. Additional specific performance observations must be included when an officer has been assigned a mark of 1, 2, 3, and 7. Those assigned the superlative mark of seven should have specific comments demonstrating how they exceeded the six “above standard” block.

...

Article 4.F.2. Section 5, Comparison, Promotion, and Rating Scales.

...

a. The Reporting Officer fills in the circle that most closely reflects the Reporting Officer’s ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known. [NOTE: This section represents a relative ranking of the Reported-on Officer, not

necessarily a trend of performance. Thus, from period to period, an officer could improve in performance but drop a category.] The visual graphic shows expected (not required) distribution.

...

c. Rating Scale on Officer Evaluation Report (OER), Form CG-5310C. The Reporting Officer fills in the circle that most closely reflects the Reported-on Officer's performance in consideration of information contained in the OER.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on the applicant's military record and submissions, the Coast Guard's submission and applicable law:

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.¹⁷

3. The application was timely filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

4. The applicant alleged that his OER dated April 30, 2019, is erroneous and unjust because his Supervisor and Reporting Officer failed to adequately rate and comment on his performance. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.¹⁸ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."¹⁹ To be entitled to relief, the applicant cannot "merely allege or prove that an [evaluation] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed evaluation was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.²⁰

¹⁷ *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

¹⁸ 33 C.F.R. § 52.24(b).

¹⁹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

²⁰ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

5. To begin, the Board notes that the applicant spent almost the entirety of his application contesting the comments made by his Supervisor and RO in their sworn declarations to both the PRRB and his application to this Board. The applicant was on notice that his focus on the comments made in the sworn declarations and not in the actual OER was problematic when he read the Coast Guard's advisory opinion, wherein the Coast Guard noted the applicant's misplaced attention. However, even after reading the Coast Guard's advisory opinion, the applicant continued attacking the sworn declarations of his rating chain. The Board agrees with the Coast Guard that the applicant's arguments and allegations regarding the sworn declarations were misplaced and failed to show that his Supervisor and RO did not carry out their duties "correctly, lawfully, and in good faith."²¹ Instead of using the *Hary* standards to prove error within the OER, the applicant focused the *Hary* standards on the sworn declarations and failed to point to one statement in the OER that violated any of the *Hary* prongs. The sworn declarations are not seen by selection boards, and he has not shown that they prove that his rating chain was biased against him, failed to follow policy, or evaluated him in bad faith. Finally, these sworn declarations are retrospective, subjective explanations by his Supervisor and RO as to why they rated the applicant the way they did. Accordingly, the Board will only address the applicant's allegations of error and injustice that point to specific issues with the contested OER.

6. The applicant alleged that the marks of 5 that he received in "Using Resources," "Professional Competence," "Speaking and Listening," "Workplace Climate," and "Professional Presence" were erroneous and unjust. According to the applicant, these marks do not accurately reflect his performance during the applicable rating period and each performance dimension should be raised to a 6. For the following reasons, the Board finds that the applicant has not proven that these marks of 5 are erroneous or unjust:

- a. First *Hary* Prong. Here, the applicant has only provided as evidence his own subjective interpretation and defense of his performance during the applicable rating period. The applicant has not pointed to one comment in the contested OER that was a misstatement of significant hard fact. The applicant did submit multiple emails and comments made by subordinates to support his claims that the marks he received from his Supervisor and RO were erroneous and their comments were misstatements of significant hard fact, but as stated in the previous finding, those statements were not contained in the contested OER, but in the Supervisor's and RO's sworn declarations. As stated in *Arens*,²² to be entitled to relief, the applicant cannot "merely allege or prove that an [evaluation] seems inaccurate, incomplete or subjective in some sense." Other than his own subjective opinions as to the quality of his work, which the Courts have already ruled is not enough,²³ and the subjective opinions of several coworkers, who were not responsible for the applicant's supervision or counseling, the applicant has provided nothing to support his claims that his contested OER was erroneous or unjust. He has provided a lot of commentary as to the opinions of others and how evaluations should be conducted, but no actual proof that the evaluations and marks he received from his chain of command were not accurate and fair.

²¹ *Arens*, 969 F.2d 1034, 1037 (Fed. Cir. 1992).

²² *Id.*

²³ *Hary*, 618 F.2d 704, 708 (Ct. Cl. 1980).

- b. Second Hary Prong. In addition to failing to prove that the first *Hary* prong was violated, the applicant also failed to prove that his supervisor used factors to evaluate him that had no business being in the rating process. Although the applicant very briefly alleged that his supervisor called him names, which led to him filing a formal complaint against the supervisor, the applicant admitted to freely canceling his complaint, and did not submit evidence supporting this claim. Nor did the applicant claim that the alleged bias was based on a protected status, such as race or religion. Therefore, the Board cannot conclude that the disputed OER was adversely affected by illegal bias.
- c. Third Hary Prong. The applicant attempted to support his claims of error by arguing that his supervisor and RO could not prove that they provided him any negative feedback during the rating period, but the supervisor and RO both stated that they had multiple conversations with the applicant about his shortcomings. The fact that they did not officially document the applicant's performance deficiencies is not uncommon, as senior officers often deliberately avoid providing official counseling in an officer's record because they know that it can have a negative impact on an officer's career. Nor is documented negative feedback required by policy. Article 1.A.2.[5]. of the Officer Evaluation Systems Procedures Manual, COMDTINST M1611.1C, only requires that the Supervisor "Provide timely performance feedback to the Reported-on Officer upon that officer's request during the period, at the end of each reporting period, and at such other times as the Supervisor deems appropriate."²⁴ At no point is the counseling or feedback required to be in writing except for the formal submission of the OER form. Moreover, the applicant did not receive "negative" marks as argued by the applicant, but received above standard marks of 5s, 6s and 7s. Article 4.E.2.h.2. states that a mark of 4 represents the expected standard of performance, and supporting comments are only required for marks of 1, 2, 3, and 7. Because the applicant received three 7s, his supervisor was only required by policy to support these marks. Accordingly, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that his supervisor and RO failed to follow applicable policy when they rated the applicant and supported their marks with comments required by policy.

The applicant also argued that his marks do not reflect all of the praise the applicant received from his supervisor and RO during the applicable rating period. The fact that the applicant's supervisor and RO provided the applicant with praise and positive feedback throughout the rating period does not prove that his marks of 5 were erroneous or unjust. On the contrary, given that the applicant received all above-standard marks in the performance dimensions during the applicable rating period, it would be surprising if he did not receive verbal praise at points throughout the rating period. Moreover, the fact that the applicant's supervisor and RO expressed gratitude and appreciation for some of the applicant's work and accomplishments does not establish that the applicant was entitled to

²⁴ Additional guidance on performance feedback can be found in Article 1.A.2.[6] of COMDTINST M1611.1C, which states the Supervisor must, "Counsel the Reported-on Officer during and at the end of the reporting period if requested, or when deemed appropriate, regarding observed performance. Discuss duties and responsibilities for the subsequent reporting period and make suggestions for improvement and development." Again, there is no requirement that the counseling or feedback be in writing.

marks of 6 in certain performance dimensions or a mark in the fifth spot on the Comparison Scale as claimed by the applicant.

Finally, the applicant failed to prove a violation of a specific statute or regulation. The applicant alleged that his supervisor and RO violated Article 19.A.1 of the Officer Evaluation Systems Manual, PSCINST M1611.1C, which states, “The Coast Guard appraisal method uses absolute standards. This means that employees are compared to a standard, and their evaluation is independent of any other employee in a work group,” when they gave him a mark in the fourth spot on the Comparison Scale based on their observations of other LCDRs’ performances. According to the applicant, this violation is proven by his supervisor’s sworn declaration wherein he admitted to comparing the applicant to another LCDR (O-4) under his supervision. The applicant argued that this amounts to a prejudicial violation of a statute or regulation, thereby satisfying the third *Hary* prong. However, the applicant has misapplied this article. This article applies to the evaluations regarding the performance dimensions, not the Comparison Scale mark. This is supported by Article 4.F.2.a. which states, “The Reporting Officer fills in the circle that most closely reflects the Reporting Officer’s ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known.” Therefore, in completing the Comparison Scale, inevitably, the applicant was to be compared to all LCDRs the RO had known throughout his career.

Therefore, the applicant has failed to prove, by a preponderance of the evidence, that his supervisor and RO violated the third *Hary* prong when they evaluated him.

7. *Quinton v. U.S.* To support his claims, the applicant cited the following statement from the *Quinton* Court: “The Board was inconsistent in its treatment of 4s. In some instances, 4s were acceptable marks and not a barrier to promotion. Other times, however, 4s were fatal to Commander Quinton’s prospects for promotion. In this case, such inconsistency rendered the Board arbitrary and capricious.”²⁵ However, *Quinton* is distinguishable from the applicant’s case. In *Quinton*, the applicant was a retired Coast Guard Commander, who contested a 1991 OER in his record, and in 1995, received a favorable adjudication from this Board, which ordered the Coast Guard to remove the contested OER from his record. Almost immediately upon the removal of the contested OER, he was selected for Commander and he received a backdated promotion as a result of his selection to Commander. However, because of the backdated promotion, he became eligible for promotion to Captain soon after, but was twice non-selected and subsequently retired. After retiring, he returned to active duty pursuant to a voluntary recall.

Upon his return, the applicant had the opportunity to review his service record, where he observed that the contested OER, that was ordered removed, was still showing in his electronic record. He again applied for relief to this Board, requesting that his non-selections be reevaluated and that his promotion to Captain be backdated. This Board found that although the contested OER remained in the applicant’s electronic record, the first Captain selection board only reviewed paper records, so he was not prejudiced by the error during the first Captain selection process. Regarding the second Captain selection board, the selection board had reviewed electronic records so it would have seen the applicant’s contested/removed OER. However, despite this prejudice, this Board

²⁵ *Quinton*, 64 Fed. Cl. 118, (Fed. Cir. 2005).

decided that even without the contested OER in his record, the applicant still would not have been promoted to Captain, and so denied his request for additional opportunities for selection. The Board analyzed whether his record appeared worse than it would have in the absence of the error and in so doing, concluded that his record would have looked only marginally better.

Pertinent to the applicant's claims here, the Board also concluded that the marks of 4 were not derogatory stating, "the erroneous OER was not a derogatory report and had no marks lower than 4." However, the Board stated on the following page, "On the four CDR OERs considered by the 1999 selection board, the applicant received a 4, an average mark, in human relations/workplace environment in all but the last OER. The selection board may well have had concerns about the applicant's ability to carry out the Commandant's human relations policies." This is where the Court concluded that this Board's analysis and ultimate conclusion regarding the applicant's second Captain non-selection was "arbitrary, capricious, and not supported by substantial evidence," because its decision was not supported by the administrative record or the Board's own reasoning. The Court stated, "Mere assumptions as to why [plaintiff] may have been passed over, or why he would have been passed over in any event, do not suffice,"²⁶ and that statement indicates that if an officer receives a mark of 4, it means that his superior officer had concerns about his ability to carry out that particular task. Such concern would certainly be considered problematic, yet earlier, with regard to the 1991 OER, the Board indicated that a report with thirteen 4s "was not derogatory."²⁷

Here, not only has the applicant not successfully gone before the Board and carried his burden of proof as did the service member in *Quinton*, but the errors in reasoning that the Court in *Quinton* found this Board committed are not present in the applicant's case. Unlike the Board in *Quinton*, which based part of its analysis on specific numerical marks of "4," here, the Board has not focused its analysis on any specific numerical mark in the applicant's record, nor has it concluded that those marks were not detrimental to the applicant's record. In fact, in this instance, this Board has made no conclusion one way or the other regarding any detriment certain scores may have had on the applicant's promotion potential. Instead, this Board has focused its analysis exclusively on the requirements set out by the *Hary* decision. This Board has analyzed whether or not the applicant has successfully proven that the disputed evaluation was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a "prejudicial violation of a statute or regulation"²⁸ and found that in this case, the applicant has failed to do so. Accordingly, and for many other reasons not fully outlined in this decision, the Board finds that the arguments and findings in the *Quinton* case are separate and distinct from the applicant's case.

8. *Sanders v. U.S.* The applicant also cited to *Sanders v. United States*,²⁹ but like *Quinton*, *Sanders* is distinguishable from the applicant's case. In *Sanders*, this Board found that four contested OERs were erroneous and/or unjust and should be removed from his record but

²⁶ *Quinton*, at 127.

²⁷ *Quinton*, at 128 - 129.

²⁸ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

²⁹ *Sanders*, 594 F.2d 804 (Ct. Cl. 1979).

failed to place an explanation of the resulting gap in his record and failed to remove the applicant's non-selections for promotion from his record.

The applicant noted that under *Sanders v. United States*,³⁰ the Court held that, "The documents which are sent to a Selection Board for its consideration therefore must be substantially complete, and must fairly portray the officer's record. If a Service Secretary places before the Board an alleged officer's record filled with prejudicial information and omits documents equally pertinent which might have mitigated the adverse impact of the prejudicial information, then the record is not complete, and it is before the Selection Board in a way other than as the statute prescribes." The applicant stated that in other words, if his April 30, 2019, OER does not portray an accurate picture of his performance, then it should either be fixed or eliminated from his official record. However, unlike the plaintiff in *Sanders*, the applicant has not proven that the disputed OER is erroneous or unjust or that the selection boards evaluating the applicant for Commander had an incomplete or inaccurate picture of his true performance. The applicant has failed to prove, by a preponderance of the evidence, that his chain of command violated any of the *Hary* prongs, and has therefore failed to prove that his contested OER was erroneous and unjust. For these reasons, the Board finds that the Court's analysis and rulings in *Sanders* does not apply to the applicant's case.

9. Retrospective Reconsideration. The Board notes that the applicant's supervisor, CDR B, after reviewing the applicant's arguments submitted with his application to this Board, agreed with the applicant that the applicant's mark of 5 for the "Using Resources" performance dimension should be raised to a 6. However, as argued by the applicant, the applicant's supervisor was given this information approximately 25 days before the end of the rating period. In addition, the applicant's supervisor had this same information available to him throughout the applicant's PRRB application, and throughout both rating process and the PRRB process, the applicant's supervisor continued to stand by the marks he gave the applicant, including the applicant's mark of 5 for the "Using Resources" performance dimension. Both the Courts³¹ and this Board³² have

³⁰ *Sanders*, 594 F.2d 804 (Ct. Cl. 1979).

³¹ *Paskert v. United States*, 20 Cl. Ct. 65, 75 (1990) (finding that "[a]fter the fact [non-selection] statements by raters contending that they scored the applicants too low on their OER's are not to be given great weight"), citing *Tanaka v. United States*, 210 Cl. Ct. 712, 713 (1976), cert. denied, 430 U.S. 955 (1977) (noting that the raters who submitted letters on behalf of the plaintiff claiming that the marks they had assigned him were too low did not "point out any misstatements of fact in their original OER's" and offered "only opinions they no longer entertained"); *Remy v. Air Force Board/or Correction a/Military Records*, 701 F. Supp. 1261, 1271 (E.D. Va., 1988) (noting that "[n]othing could be more inimical to the fair rating system" than allowing *post hoc* judgments years later and after an officer has been non-selected for promotion); *Voge v. United States*, 11 Cl. Ct. 510, 515 (1987), rev'd on other grounds, 844 F.2d 776 (1988) ("Nor is it enough to impel us to act that the rater may now say that he scored the claimant too low. In *Tanaka*...we held that rater's statement that his opinion has changed and that he would now rate plaintiff higher, absent any misstatements of fact in the OER, did not tender a triable issue on the accuracy of the OER"); *Chronis v. United States*, 222 Cl. Ct. 672, 673 (1980) (holding that "the retrospective statements of plaintiffs rating officers are insufficient to prove that the AFBCMR acted arbitrarily in refusing to void the challenged OER"); *Reid v. United States*, 221 Cl. Ct. 864, 867 ("The retrospective statements of plaintiff's rating officers are thus insufficient to prove that the board acted arbitrarily in refusing to void the challenged OER's."); *Savio v. United States*, 213 Cl. Ct. 737, 740 (1977) (denying relief despite "after-the-fact letters from rating officers who in retrospect state that in their opinion they rated a particular officer too low").

³² Decision of the Deputy General Counsel in BCMR Docket No. 84-96 (denying relief because the CO's statement arguing that the marks should be raised constituted "retrospective reconsideration"); see also BCMR Docket Nos. 2015-136 (finding that a Supervisor's statements supporting removal of an OER constituted "retrospective

held that “retrospective reconsideration” of OER marks and comments by rating officials should be given little weight. The Board finds no reason to deviate from these long held positions in the applicant’s case. As noted in the previous findings, the applicant has failed to prove that any of the *Hary* prongs were violated during his evaluation process, and therefore likewise failed to prove that the Coast Guard and its officials failed to carry out their duties “correctly, lawfully, and in good faith.”³³

10. Character References. As stated previously in this decision, in an effort to rebut the applicant’s supervisor and RO’s declarations, the applicant solicited multiple letters and references from previous coworkers and subordinates, who provided their own opinions of the applicant’s performance and conduct during the applicable rating period. However, the Board has reviewed these emails and statements and found them unpersuasive. These individuals were not the applicant’s supervisors and were not privy to the same knowledge and information that the applicant’s supervisor and RO were regarding the applicant’s overall performance and attitude. For instance, none of the statements submitted by the applicant acknowledged that the applicant would often complain openly about his workload in front of his crew and unit, or that his supervisor received such complaints. These coworkers also failed to acknowledge that the applicant required more counseling and guidance than that expected of lieutenant commanders. Moreover, these statements do not prove that the applicant’s supervisor and RO failed to abide by Coast Guard policy and procedures when they executed their duties as rating officials.

11. The applicant made numerous allegations with respect to the actions and attitudes of various officers. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and/or are not dispositive of the case.³⁴

12. For the reasons outlined above, the applicant has also failed to show that his April 30, 2019, OER contained a “misstatement of significant hard fact,” factors that “had no business being in the rating process,” or a prejudicial “violation of a statute or regulation.”³⁵ Therefore, the applicant has failed to prove, by a preponderance of the evidence, that the OER should be removed from his record or that his marks should be adjusted. Because the applicant has not proven that the disputed OER is erroneous or unjust, there are no grounds for directing the Coast Guard to convene an SSB. His requests for relief should therefore be denied.

reconsideration,” which “is not grounds for removing” an OER); 2011-179 (denying relief and finding that a CO’s statement constituted “retrospective reconsideration” that did not warrant raising marks on the disputed OER); 67-96 (denying relief because three statements by the rating chain supporting the application “constituted ‘retrospective reconsideration’ induced by the applicant’s failure of selection”); 189-94 (denying relief and finding that a supervisor’s claim that a mark should be raised because the applicant was never counseled about the deficiency constituted “retrospective reconsideration” that did not justify raising the disputed OER mark); 24-94 (finding that a Reporting Officer’s statement that “had I known then what I know now I would have marked him differently” constituted retrospective reconsideration that did not justify changing the OER).

³³ *Arens*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

³⁴ 33 C.F.R. § 52.24(b); *see Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that “appear frivolous on their face and could [not] affect the Board’s ultimate disposition”).

³⁵ *Hary*, 618 F.2d at 708.

ORDER

The application of Lieutenant Commander [REDACTED] [REDACTED] USCG, for correction of his military record is denied.

December 15, 2023

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